GANAPATHY RENGASAMY

v.

PUBLIC PROSECUTOR

FEDERAL COURT, KUALA LUMPUR
CHONG SIEW FAI CJ (SABAH & SARAWAK)
EDGAR JOSEPH JR FCJ
SHAIK DAUD ISMAIL JCA
[CRIMINAL APPEAL NO: 05-107-93]
18 JUNE 1997

CRIMINAL PROCEDURE: *Judgment - Grounds of judgment - Trial judge - Importance of "speaking judgment" - Substantial reproduction of prosecution witnesses' testimony - Whether trial judge analysed or assessed testimony - Whether defence assessed - Whether trial judge must consider a 'weak' defence*

CRIMINAL LAW: *Dangerous Drugs Act 1952, ss. 39B(1)(a) & 37(d) - Possession - Definition - Burder of proof - Presumption - Shifting of burden - Whether presumption rebutted - Whether there was misdirection or non-direction on part of trial judge - Whether accused had knowledge of dangerous drugs*

The appellant was convicted in the High Court for trafficking in heroin under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and was sentenced to death. The present appeal was by the appellant against his conviction.

The appellant was arrested whilst carrying a bag which contained heroin. While admitting that he was carrying the bag, the appellant vehemently denied any knowledge of its contents. He claimed that the bag was handed over to him by his employer, one Rahman. His defence was therefore one of an innocent carrier.

Held:
Per Shaik Daud Ismail JCA

[1] The grounds of judgment of the learned judge were far from satisfactory in that they did not convey a "speaking" judgment although the importance of this has been stressed in a number of decided cases. The judgment consisted substantially of a reproduction of prosecution witnesses' testimonies in the form of questions and answers. The learned judge failed to analyse or assess these testimonies but merely set them out and presumably accepted them without question. He did not set out the defence of the appellant with a view to assessing it, nor did he test the defence by comparing it with the evidence adduced by the prosecution.

[2] However weak a defence may be, trial judges being judges of both fact and law should not just brush aside the defence on the basis that the prosecution witnesses are to be believed and not the defence witnesses. Where the law casts the onus of giving an explanation upon an accused person, and the explanation is given, the court is duty bound to consider whether it might reasonably be true, although not convinced of its truth.

[3] The word "possession" is a vague and general word which cannot be closely defined. It implies some general knowledge as to the existence of a chattel and some idea of its whereabouts in order to exercise some control over it though not necessarily full or exact knowledge.

[4] The burden on the prosecution throughout was to prove its case beyond a reasonable doubt. But, once the prosecution proved that the appellant had custody or control of the bag containing the drugs in question, then by s. 37(d) of the Act, he was deemed to have been in possession of such drugs and to have known of the nature of such drugs, and so, the onus had shifted to him, to prove the contrary, on a balance of probabilities.

[5] Based on the totality of the evidence, there was no affirmative evidence whatsoever that the appellant knew he was carrying heroin; only the presumption under s. 37(d) of the Act says so, and he had rebutted it by his own denial on oath.

[6] There were many material questions left unanswered by the prosecution in this case and coupled with the learned judge's failure to address material aspects of the defence's case, there had been a serious misdirection by way of non-direction. On the totality of the case, the appellant had rebutted the presumption under s. 37(d) of the Act, on a balance of probability. The appellant had established that, even though he had custody and perhaps control of the bag and thereby had possession of it, at the time of his arrest, he had no knowledge whatsoever of its content.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Perayu telah disabitkan oleh Mahkamah Tinggi kerana kesalahan mengedar dadah heroin di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') dan berikutan itu telah dijatuhkan hukuman mati. Rayuan semasa ini adalah oleh perayu terhadap sabitannya itu.

Perayu telah ditahan membawa sebuah beg yang mengandungi heroin. Sambil mengakui bahawa beliau membawa beg itu, perayu telah dengan sesungguhnya menafikan sebarang pengetahuan mengenai kandungan beg itu. Beliau menuntut bahawa beg itu telah diserahkan kepadanya oleh majikannya, seorang bernama Rahman. Pembelaan beliau dengan itu adalah bahawa beliau adalah pembawa yang tidak bersalah.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Alasan penghakiman hakim yang bijaksana sangat tidak memuaskan iaitu penghakiman itu tidak merupakan penghakiman "bermaksud" walaupun pentingnya hal ini telah ditekankan dalam beberapa kes yang telah diputuskan. Penghakiman itu terdiri secara substansialnya dari penghasilan semula testimoni-testimoni saksi pendakwaan dalam bentuk soalan dan jawapan. Hakim yang bijaksana telah gagal untuk menganalisa atau menilai testimoni-testimoni ini tetapi hanya membentangkannya dan dijangkakan telah menerimanya tanpa sebarang soalan. Beliau telah tidak membentangan pembelaan perayu dengan harapan untuk menilainya dan juga tidak menguji pembelaan itu dengan membandingkannya dengan keterangan yang telah dikemukakan oleh pihak pendakwaan.

[2] Seberapa lemah sekalipun sesuatu pembelaan, hakim-hakim perbicaraan, sebagai hakim-hakim bagi fakta dan juga undang-undang tidak seharusnya mengeneoikan pembelaan itu semata-mata atas dasar bahawa saksi-saksi pihak pendakwaan harus dipercayai dan bukannya pihak pembelaan. Di mana undang-undang meletakkan bebanan memberikan penjelasan ke atas seorang tertuduh, dan penjelasan diberikan, yang mana jika ianya konsisten dengan ketidak-bersalahan, maka mahkamah berkewajipan untuk menimbangkan samada ianya berkemungkinan benar, walaupun tidak yakin dengan kebenarannya.

[3] Perkataan "milikan" adalah perkataan yang tidak jelas dan umum, yang mana tidak boleh ditafsirkan dengan teliti. Ianya menunjukkan pengetahuan secara umum mengenai kewujudkan catel dan juga segelintir pendapat di manakah ianya berada agar dapat melaksanakan kawalan ke atasnya walaupun tidak mengetahui sepenuhnya atau dengan tepatnya.

[4] Bebanan ke atas pihak pendakwaan sepanjang kes itu adalah untuk membuktikan kes mereka di luar keraguan yang wajar. Tetapi sebaik sahaja pihak pendakwaan telah membuktikan bahawa perayu mempunyai dalam jagaan atau kawalannya beg yang mengandungi dadah yang dipersoalan itu, maka melalui s. 37(d) Akta tersebut beliau akan dianggap

mempunyai dalam milikan dadah sedemikian dan sebagai telah mengetahui akan sifat dadah yang sedemikian, dan oleh itu, bebanan tersebut telah beralih kepadanya, untuk membuktikan sebaliknya, atas imbangan kebarangkalian.

[5] Berdasarkan keseluruhan keterangan, tidak terdapat keterangan yang bersifat pengakuan apa pun bahawa perayu mengetahui beliau sedang membawa heroin, hanya tanggapan di bawah s. 37(d) Akta tersebut menyatakan sedemikian dan beliau telah menyangkalnya dengan penafiannya sendiri atas sumpah.

[6] Terdapat banyak soalan-soalan penting yang tidak berjawab oleh pihak pendakwaan dalam kes ini dan bersama-sama dengan kegagalan hakim yang bijaksana untuk mengemukakan aspek penting kes pihak pembelaan, terdapat salah-nyataan yang amat serius melalui ketiadaan arahan. Berdasarkan kes itu secara menyeluruh, perayu telah menyangkal tanggapan di bawah s. 37(d) Akta tersebut, atas imbangan kebarangkalian. Perayu telah menetapkan bahawa, walaupun beliau mempunyai dalam jagaan dan mungkin kawalannya akan beg itu dan oleh itu mungkin mempunyai milikannya, pada waktu penahanan beliau, beliau tidak mengetahui mengenai kandungannya sama sekali.

[Rayuan dibenarkan.]

Cases referred to:
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 ***(cit)***
Balasingam v. PP [1959] MLJ 193 ***(cit)***
Leow Nghee Lim v. Rex [1956] 22 MLJ 28 ***(refd)***
Mat v. PP [1963] MLJ 263 ***(cit)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073 ***(cit)***
Murugiah v. PP [1941] MLJ 17 ***(cit)***
Public Prosecutor v. Yuvaraj [1969] 2 MLJ 89 ***(cit)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(d), 39B(1)(a)

[Appeal from High Court, Federal Territory; Criminal Trial No: 47-29-89]

For the appellant - Bhagwan Singh; M/s Bhagwan Singh
For the respondent - Abang Iskandar Abang Hashim DPP

Reported by Ling Hea Hoon

JUDGMENT

Shaik Daud Ismail JCA:

By a majority decision we had allowed this appeal, quashed the conviction and set aside the sentence of death. We indicated then that we would give our reasons in writing and this we now do.

On 27 October 1993, the Kuala Lumpur High Court convicted the appellant for an offence of trafficking in 134.M grams of heroin, under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). He was accordingly sentenced to death. This was the second time the appellant was before this court. Appellant was previously charged with the same offence before another judge of the Kuala Lumpur High Court on 11 August 1991. At the close of the case for the defence on 14 March 1991, appellant was acquitted and discharged. On appeal by the Public Prosecutor, the Supreme Court, on 4 January 1993, allowed the appeal and ordered a retrial before another judge. At the outset of this appeal, Mr. Bhagwan Singh, assigned counsel for the appellant submitted that, as the appellant had to undergo two trials on the same charge, with the same set of witnesses and being acquitted at one and convicted at the other, is in itself an indication of a grave doubt having been created. The learned Deputy Public Prosecutor (DPP) submitted that the issue before the Supreme Court was on whether the burden on the defence was on a reasonable doubt or on a balance of probability. We hold that, whatever may be the reasons for the order of the re-trial that by itself does not indicate any doubt.

The facts leading to the arrest of the appellant are that on 12 May 1989, as a result of information received, Inspector Lai Joo Wah (SP8) led a police party consisting of DPC 109669 Cheng Siang Kong (SP3), D/Constable Woon Tan Seng and D/Constable Mohamad Shahar to lay an ambush at Jalan Kepong, Jinjang North. It would appear that the informer was also with the police party and it was he who pointed out the appellant as the target. SP3 testified that at about 5pm that day while he and Woon were by the side of Jalan Kepong, Shahar joined them and told them that the target had come out. At the same time SP3 said he saw the appellant alone some 100 metres away coming out of a lane towards Jalan Kepong and he had with him a dark maroon bag under his armpit. Later SP3 said it was a red bag but corrected himself and said it was a dark maroon bag. SP3 said that the appellant walked to the edge of Jalan Kepong stopped and boarded a mini bus going in the direction of Kuala Lumpur. The bus then proceeded towards where SP3 and Woon were and when it arrived near them, SP3 stopped the bus and the entire police party boarded the bus. In the bus SP3 said he saw the appellant seated alone with the bag he was earlier carrying placed on an empty seat next to him. SP3 testified that he and two other police personnel sat behind the

appellant. How SP3 and two other police personnel could sit behind appellant was not explained as all seats on buses, we believe, are for two persons. The bus proceeded all the way to Jalan Tun Perak and when it stopped at a traffic light in front of the Ban Hin Lee Bank, SP3 said appellant alighted carrying the bag with him, followed by him and the other two police personnel. The appellant walked towards Ban Hin Lee Bank and when he arrived in front of the bank, Woon stopped him and identified himself as the police. SP3 said that at that time appellant dropped the bag and started to struggle to free himself. SP3 picked up the bag. Then SP8, who had been following the bus in a car arrived and all three police personnel with the appellant were taken in the car to the Police Contingent Headquarters Kuala Lumpur. Investigations revealed that the bag carried by the appellant contained heroin weighing 134.84 grams as confirmed by the government Chemist Kee Sue Sing (SP7).

The appellant in his defence gave evidence on oath. He testified that the day in question was his son's birthday and while he was at home his employer a Chinese convert by the name of Rahman bin Noh @ Ah Kiong came to his house wanting him to do a job of painting a house in Jinjang. He said he followed Rahman to go and see the house that needed painting and when they could not find the owner of the house he and Rahman went to a coffee shop. There Rahman met with another person and he saw Rahman take a brown bag from his car. Then he and Rahman decided to take a bus home. According to appellant he and Rahman boarded the bus. In the bus Rahman was still holding the brown bag. During the journey and just before he alighted, he said Rahman gave him the brown bag to hold which he did. Rahman being his employer, this act came naturally and no questions were asked. Then Rahman signalled to him to alight and as he was doing so someone held him at the waist band from behind and as a result he fell down and was apprehended and handcuffed. Then he discovered he was arrested by the police. While admitting he was carrying the bag he vehemently denied any knowledge of its content. In other words the defence is one of an innocent carrier.

First and foremost we would like, with respect, to mention here that the grounds of judgment of the learned judge are far from satisfactory in that they do not convey a "speaking" judgment although the importance of this has been stressed in a number of decided cases. (See, for example, *Balasingam v. PP* [1959] MLJ 193 per Ismail Khan J (as he then was) and *Murugiah v. PP* [1941] MLJ 17 per Horne J). They consist substantially of reproduction of prosecution witnesses' testimonies in the form of questions and answers. The learned judge failed to analyse or assess these testimonies. He merely set them out and presumably accepted them without question. He has not set out the defence of the appellant with a view to assessing it, nor has he tested the defence by comparing it with the evidence adduced by the prosecution.

It needs to be remembered that however weak a defence may be, trial judges being judges of both fact and law should not just brush aside the defence on the basis that the prosecution witnesses are to be believed and not the defence. Where the law casts the onus of giving an explanation upon an accused person, and the explanation is given, which if consistent with innocence, the court is duty bound to consider whether it might reasonably be true, although not convinced of its truth. On the issue of the court's duty to consider the defence, the age old decision in *Mat v. PP* [1963] MLJ 263 is still good law today as it was then. This was followed by the Supreme Court in *Mohamad Radhi b. Yaakob v. PP* [1991] 3 MLJ 169.

In *Leow Nghee Lim v. Rex* [1956] 22 MLJ 28, a case of possession of opium Taylor J expounded and discussed the word possession. At p. 30 of his judgment he said:

> A man must know of the existence of a chattel and have some idea of its whereabouts before he can exercise any control over it. The word possession therefore implies some knowledge but not necessarily full or exact knowledge.

And at p. 31 of the judgment he continued:

> The word "possession" is a vague and general word which cannot be closely defined. Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge.

These propositions of law are as good today as they were in 1956.

The burden on the prosecution throughout is to prove their case beyond a reasonable doubt (see *Arulpragasan v. PP* [1997] 1 MLJ 1.) But, once the prosecution had proved that appellant had custody or control of the bag containing the drugs in question, then by s. 37(d) of the Act, he was deemed to have been in possession of such drugs and to have known the nature of such drugs, and so, the onus had shifted to him, to prove the contrary, on the balance of probabilities. (See *PP v. Yuveraj* [1969] 2 MLJ 89 PC).

We have set out the appellant's defence above and from the defence he admitted he was carrying the bag, in which the drugs were later found by the police, and he also explained the circumstances in which he came to be holding the bag, but he says that he had no knowledge whatsoever that the bag he was carrying contained the drugs. At the close of the case for the defence, had the prosecution proved beyond a reasonable doubt that he knew the contents of the bag to be drugs? Based on the totality of the evidence, it is our considered view that there is no affirmative evidence whatsoever that appellant knew he was carrying heroin, only the presumption under s. 37(d) of the Act says so and he has rebutted it by his own denial on oath.

Appellant in his defence says that he boarded the bus not alone but with his employer Rahman and that he was then not carrying the bag. First of all, let us see if this character Rahman exists? It is not uncommon for accused persons in drug trafficking cases to mention the presence of a third person but in most of those cases the alleged third person either does not exist at all or could never be traced. In this case, however, the character Rahman did in fact exist. As a result of the appellant's information, given during an interrogation after his arrest, Rahman b. Noh @ Ah Kiong was in fact apprehended by the police and subpoenaed by the prosecution but at the close of the prosecution's case, was made available to the defence. The investigating officer Inspector Saumi bin Man (SP1) confirmed that the Rahman arrested and made available was the same Rahman – the appellant's employer. He also confirmed that Rahman was charged for trafficking in 10 pounds of heroin and was convicted and sentenced to death by another High Court. He also confirmed that Rahman was arrested based on the information given by the appellant and that appellant had stated that the bag he was carrying belonged to Rahman. From this, it seems clear to us that Rahman is not a figment of appellant's imagination but actually existed. In spite of this the learned judge made no finding as to the existence or otherwise of Rahman. Nowhere has the learned judge made a finding as to whether Rahman was at the scene as testified by the appellant.

No doubt SP3 said that he saw the appellant alone boarding the bus as opposed to the appellant's version that Rahman too boarded the bus. This version by the appellant is not improbable, given that the police personnel were quite a distance away, and the fact that the particular area in question ie, Kepong at 5pm would be busy with people and vehicles at that time of the day and given that the police were concentrating on the appellant, they could well have not been aware of others in the vicinity.

Next, the appellant says that when he boarded the bus he was not carrying the bag. Again the learned judge made no finding on this. Now the police party was some 100 to 150 metres away when appellant was first pointed out to them as the target. From this distance, according to the evidence of SP3, he could see appellant had a bag "warna perang tua" (dark maroon) under his right armpit. It is rather surprising that from that distance, he could see even the precise colour of the bag under appellant's right armpit. A photograph of the bag revealed that it was not such a big bag. It was rather a small flat bag and if held under one's armpit, we believe SP3 could not be able to say what it was in the first place let alone its precise colour. Incidentally the colour of the bag was not dark maroon but actually brown as testified by the appellant. Again the learned judge made no finding on this even though it was raised in submission.

The scenario established by the police witnesses seems to be that while they were in ambush position, the informer identified appellant as the target as he was coming out of a lane and the police saw the appellant alone with a dark maroon hag under his right armpit. In the light of this the nagging question is why did they not spring the trap and apprehend the appellant then? As a matter of fact SP3 did supply the answer. He said that if they tried to arrest him then in view of the distance between him and the police, the chances of his absconding cannot be ruled out. Whilst this explanation may appear to be credible, we cannot but say that there were four police personnel in the vicinity and one of them was in a car, while the appellant was allegedly alone and on foot. The next question which seems to nag our minds is that, even if they could not apprehend him before he boarded the bus because of the distance between them, they were offered a second opportunity, in fact a better opportunity, to apprehend him, with the goods, so to speak, when the very same bus with the "target' in it, came to where the police personnel were in ambush. The police personnel even boarded the same bus and they saw appellant with the same bag and yet they did not apprehend him. The explanation given by Inspector Lai this time borders on absurdity. He said that if an arrest was made in the bus then the police may have to record the statements of everyone in the bus, and all of them have to be called as witnesses. Why this has to be so was never explained. The appellant was only arrested about seven miles away from the spot he was first seen with the alleged offending bag. There was no reasonable explanation for this. The learned judge too did not find this odd; in fact, he made no comment on this.

The fact that the target had been identified, was seen allegedly alone carrying a bag, was not immediately apprehended and later when the police personnel boarded the bus again saw the target and the bag and again not apprehended, lend credence to the appellant's defence that when he was walking towards the main road to board the bus he was **not** carrying the bag, and the bag was only given to him on the bus before he alighted. If he was so seen as claimed by SP3, the police would not have hesitated to apprehend him. The defence also lend credence to the assertion that appellant was in fact not the target but probably someone else. This someone else could well be Rahman who was in fact later arrested as a result of information given by the appellant. According to appellant Rahman was in the bus that day.

We find there are many material questions left unanswered by the prosecution in this case and, coupled with the learned Judge's failure to address material aspects of the defence's case, there has, in our view, been a serious misdirection by way of non-direction. It is our considered finding that on the totality of the case, the appellant has rebutted the presumption under s. 37(d)

of the Act, on a balance of probability. The applicant has established that, even though he had custody and perhaps control of the bag and thereby had possession of it, at the time of his arrest, he had no knowledge whatsoever of its contents. The learned judge failed to give consideration to this aspect of the defence. We therefore allowed the appeal, quashed the conviction and set aside the sentence. We ordered the appellant to be acquitted and discharged.